matter of speculation. On the evidence and in circumstances of the present case, the fact that Cik Zainun entered into the 1978 Agreement in her name trading as Intan Enterprises Company does not necessarily mean that she was entering into the agreement solely in her own right. There are strong indications that Seri Padu must have been aware that she was establishing a partnership when she entered into the agreement. She is the first Malay lady to our knowledge who would be venturing into a logging business. It would be hard to expect that she would have ventured into this business by herself. In any case, it cannot be disputed that she is a party in the present action. If indeed it can be established that the others have never been involved, an application can always be made during the trial for their names to be struck out as parties.

Above all, from what has transpired, it is desirable in the interest of Seri Padu itself to determine the real nature of the $420,000 paid before and on signing the agreement, and in what way, if at all, it affects the 1978 Agreement, since the immediate payment stated in the 1978 Agreement for giving a right to exploit timber over a vast area is only $1.

On these considerations, the balance of convenience clearly shows that the injunction should stay. Intan will suffer irreparable loss if it is lifted. If not for the injunction, Seri Padu will allow others to exploit timber from the area in which Intan has still an interest, having outlayed vast sums.

Appeal is dismissed with costs. Deposit to respondent to account of taxed costs.

Appeal dismissed.

Solicitors: *Dato K.C. Koh & Partners; Rithauddeen & Aziz.*

LETCHUMI AMMAL v. NAM FONG HOUSING SDN. BHD.

[F.C. (Suffian L.P., Syed Othman & Abdul Hamid F.JJ.) February 3 & March 3, 1982]

[Kuala Lumpur — Federal Court Civil Appeal No. 107 of 1980]

Contract — Agreement for consideration to quit and deliver vacant possession of squatter hut by certain date — Squatter hut occupied by tenant who refused to quit — Whether time essence of contract — Action by owner of land against owner of squatter hut — Tenant subsequently compensated by owner of land and vacated hut — Action by owner of hut to claim sum under agreement — Contracts Act, 1950, ss. 41 & 42.

In this case the appellant had built a squatter house on a piece of land and had let it out to a tenant. The owner of the land made an agreement with her whereby it was agreed that the owner would pay her $600 and she agreed to quit and deliver up possession of the house by April 10, 1974. She had the option either to demolish or deliver up possession of the hut. In either event the owner was to pay her a further sum of $5,400 by way of compensation. If the appellant failed to demolish or deliver up possession on or before April 10, 1974 she agreed to pay the owner liquidated damages of $200 per day for the breach. The appellant did not fulfil her part of the bargain and the owner (respondent) brought an action seeking an order for the appellant to demolish the house and claiming damages. The appellant's defence was that the tenant of the hut refused to quit and she took out a third party notice against the tenant. In his defence the tenant stated that he had verbally agreed to quit and deliver up possession of the hut if $3,000 was paid to him as compensation. The owner paid the tenant and he vacated the house. The appellant then brought an action seeking payment of the $5,400. The two actions were consolidated and the President of the Sessions Court allowed the respondent's claim ordering the appellant to pay liquidated damages of $1 and to refund the $600. He dismissed the appellant's claim against the tenant and the owner for the sum of $5,400. On appeal the High Court affirmed the dismissal of the appellant's claim against the owner but allowed the appeal against the tenant ordering the tenant to indemnify the appellant the $600 which she had to pay to the owner and costs. The appellant appealed.

Held: (1) the agreement in this case was nothing more than an accommodation or expression of goodwill by the owner of the land to the appellant, provided the agreement was performed in time. Time was of the essence of the contract;

(2) in this case section 42 of the Contracts Act could not apply as (a) the performance was not done within the stipulated time as promised, (b) the appellant's plea that she was unable to perform because the tenant had refused to vacate the house cannot be accepted in view of her express undertaking under the agreement, (c) the performance by the tenant cannot be regarded as performance by the third person within the meaning of section 42 of the Act, as the tenant was in the same position as the appellant and (d) the owner by getting back the land did not get any benefit as what he got was rightly his own from the beginning;

(3) the agreement clearly intended that the appellant would get the $6,000 if she herself would demolish or deliver possession of the house by April 10, 1974 and section 41 of the Contracts Act was the appropriate section;

(4) in this case the appellant had helped herself to substantial gains by arrogating to herself ownership of the land, paying no rent whatever and renting out the squatter house at $80 a month for almost 20 years. In the circumstances, neither law nor equity could help her.

Case referred to:-

(1) *Loudon* v. *Ryder* [1953] 2 Q.B. 202; [1953] 1 All E.R. 741.

FEDERAL COURT.

C. Das for the appellant.

K.L. Chai for the respondent.

Cur. Adv. Vult.

Syed Othman F.J. (delivering the judgment of the Court): This appeal is against the decision of the High Court at Kuala Lumpur dismissing the appeal by the appellant against the decision of the Sessions Court dismissing her claim of $5,400 under an agreement with the respondent (owner) a building developer and owner of a piece of land in Sentul, Kuala Lumpur, on which the appellant had built a house which was occupied by a tenant. On February 16, 1974 the parties entered into an agreement. In the recital, the main body of the agreement and in the appellant's own pleading the house was described as a squatter house.

The substance of the agreement was that the owner paid her $600 and she agreed to quit and deliver vacant possession of the house which she had the option either to demolish or of which to deliver vacant possession by April 10, 1974; in either event the owner was to pay her a further sum of $5,400 by way of compensation and travelling allowance; if the appellant failed to demolish or deliver vacant possession of the house on or before April 10, 1974 she agreed to pay the owner liquidated damages of $200 per day for the breach.

The appellant did not fulfil her part of the bargain. In May 1974 the owner brought an action

(Sessions Court Civil Action 369/74) seeking the appellant to demolish the house and liquidated damages of $200 per day from April 10, 1974. The appellant entered her defence stating that the liquidated damages of $200 per day was a penalty; she had been unable to fulfil her part of the bargain because the tenant staying in the squatter house refused to quit. The appellant took out a third party notice against the tenant seeking that he indemnify her against the owner's claim. The tenant in his defence of the third party notice stated that he had verbally agreed with the appellant to quit and deliver vacant possession of the house on condition that $3,000 was paid to him as compensation on or before April 10, 1974; the condition was not fulfilled; he vacated the house on August 31, 1974 on the owner having paid him $3,000. At the trial it was conceded the sum paid was $3,500 (see page 38 of appeal record). The appellant then brought an action (Sessions Court Civil Action No. 307/75) against the owner and tenant seeking payment of the $5,400. The owner's defence to this claim, among other things, was that the appellant was precluded from the claim as she did not vacate the house by April 10, 1974 as required under the agreement.

The trial of these two actions was consolidated in the Sessions Court. The learned President allowed the respondent's claim ordering the appellant to pay the respondent liquidated damages in the nominal sum of $1 and to refund $600; he dismissed the appellant's claim against the tenant and also her claim against the owner for the balance sum of $5,400.

The High Court at Kuala Lumpur in its appellate jurisdiction affirmed the dismissal of the appellant's claim against the owner, allowed the appeal against the tenant and ordered the tenant to indemnify the appellant the $600 which she had to refund to the owner and to indemnify the owner and the appellant against all costs in both the Sessions Court and High Court.

In his judgment the learned President Sessions Court said that the appellant was to blame for not vacating the land by April 10, 1974. The learned appellate judge said in effect that under the terms of the agreement, essentially, the owner agreed to pay the appellant $5,400 on delivery of vacant possession on or before April 10, 1974; time was referred to in the agreement as to be of the essence; the appellant could not claim that she had performed her part of the bargain by the substituted performance of the tenant when she herself failed to perform her part of the bargain.

By the grounds of appeal it is contended in effect that the $6,000 agreed to be paid under the agreement must be treated as compensation to demolish the appellant's house which the owner was obliged to pay notwithstanding late delivery; the trial court was wrong in treating time as of the essence of the contract and in holding that the owner was not obliged to pay, as the owner accepted late performance of the contract by demolishing the house; the appellate court also erred in failing to apply section 42 of the Contracts Act, 1950 (Revised — 1974) and in not considering that the Sessions Court had erroneously applied section 41 of the Act; the appellate court did not apply the principle of equity in not allowing compensation to be paid for demolishing the house, and in not considering that she was a victim of the tenant's intransigence and that there was conspiracy between the owner and the tenant.

The main question to be determined is whether time was of the essence of the agreement before the appellant could be entitled to payment under the agreement. But we shall also deal with the consequential matters raised.

For the appellant it is argued that by the terms of the agreement the promise of payment was in fact for compensation and time was not of the essence. It is also contended that the appellate court has misconstrued the essential character of the agreement which was not an agreement for the plain delivery of the house but for its purchase for demolition and the $6,000 was compensation for the purpose.

In dealing with the situation, the respondent could have taken court action against the appellant, but the chances are the proceedings would have been protracted to the advantage of the appellant; the owner could have used reasonable force as was necessary to remove the house and the occupier, but any considerate owner of land would wish to avoid this course of action for fear of losing goodwill affecting the property and of those who live on the land. The owner chose a good course by trying to pay off the appellant and entered into the agreement.

For her difficulty with the tenant the appellant alleges there was collusion between the owner and the tenant when the tenant refused to move out in good time, and also says that even if the owner got possession of the house after the stipulated time, she must be considered to have performed her part of the bargain and entitled to the compensation under the agreement, and the compensation was in fact the purchase price of the house.

To these arguments, it must be said that when she entered into the agreement she must have taken into account her relationship with the tenant. The fact that she agreed to pay, what the courts below later held to be a penalty, $200 per day, if she failed to perform her part of the agreement, shows that she knew that time was of the essence of the contract. The fact that the owner took court action to enforce the contract in about a month after default not only shows that time was of the essence, but also dispels the allegation that the respondent could have been responsible for the tenant refusing to move out in time. It was not disputed that the appellant squatted on the land; she unlawfully occupied the land by building a house which she rented out. No evidence was adduced that she had obtained the permission of anyone before doing so, or that she had been paying anything for occupying the land. On this consideration by itself, the owner was entitled, using no more force than reasonably necessary, to remove the house without even asking the appellant's permission. At law a squatter or trespasser has no right whatsoever to what he has affixed on the land without permission. The house was the product of a trespass. There is no question of the owner of land having to purchase

the house or having to pay compensation for its removal. The agreement in our view was nothing more than an accommodation or expression of goodwill by the owner of the land to the appellant, provided the agreement was performed in time.

It is further argued that since the owner got the house from the tenant in August 1974 and received benefit, the contract was therefore still subsisting. Section 42 of the Contracts Act, 1950 referred to reads:

"When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor."

Applying the provision, the owner would be in the position of the promisee, the tenant would be the third person, and the appellant would be the promisor. The owner (promisee) in his action C.A. 369/74 against the appellant (promisor) sought performance and liquidated damages. At the trial the court was informed that the house had been demolished and the owner had got back the land, only damage was to be determined. Enforcement of the contract, i.e. delivery of the house, does not therefore arise. But we are asked that the provision should be construed that when a promisee accepts performance of the promise from a third person and gets a benefit, he should pay the promisor compensation.

In reference to benefit we have been referred to a number of authorities. We do not think they are of any assistance in the present case. We have not been shown — nor are we aware of — any authority where a squatter or trespasser can be awarded compensation for squatting or trespassing or removal of any fixture put on the land by the trespasser. The present case stands on its own.

We do not think section 42 of the Contracts Act can apply here for these reasons:

First, performance was not done within the stipulated time, as promised.

Secondly, the appellant's plea in her defence that she was unable to perform because the tenant had refused to vacate the house cannot be accepted in view of her express undertaking under the agreement.

Thirdly, the performance by the tenant by reason of his being paid by the owner cannot be regarded as performance by the third person within the meaning of section 42 of the Contracts Act, as the tenant was in the same position as the appellant. There was nothing to prevent the owner from dealing direct with the tenant. If the owner had wanted to, he could have dealt with the tenant from the beginning; as soon as the tenant had vacated the house, he could have pulled the house down without paying the appellant anything. The tenant, knowing that the appellant and he himself were not on the right side of the law, and being in actual possession of the land, was in a better position to deal with the owner and surrender the land. The indications are that wanting goodwill with everyone concerned the owner dealt with the appellant so that she could deal with the tenant and take away the house materials, if she so desired. There is every reason to believe that she failed to deal with the tenant, because, while she herself was prepared to accept benefit of the $6,000, she in turn did not extend any part of the benefit to the tenant, who would have been badly affected by having to vacate the house and seek new accommodation.

Fourthly, the owner, by getting back the land, did not get any benefit. What he got was rightly his from the beginning.

We agree with the learned President, Sessions Court, that section 41 of the Contracts Act is the appropriate section to apply here:

"41. If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it."

The agreement clearly intended that the appellant would get the $6,000 if she herself would demolish or deliver possession of the house by April 10, 1974. She did neither on the stated day. The fact that the owner paid the tenant $3,500 on August 31, 1974, less than what he was prepared to pay the appellant if she had demolished or delivered the house by April 10, 1974, does not mean that the owner was accepting late performance. It fortifies the contractual intent, i.e. time was of the essence of the contract. The fact that she was held to ransom by her tenant is immaterial. She put him on the land. Under the agreement it was a matter for her to deal with the house and its occupier.

It should be borne in mind that the law is that when the defendant (in this case the appellant) has by trespass made use of the plaintiff's (in this case the owner's) land the plaintiff is entitled to receive by way of damages such sum as should reasonably be paid for the use, and it is immaterial that the plaintiff was not in fact thereby impeded or prevented from himself using his own land either because he did not wish to do so or for any other reason. (See 11 *Halsbury's* Laws of England, 3rd ed. p. 266, para. 441). If the trespass is accompanied by aggravating circumstances, the owner of the land may be awarded exemplary damages. See *Loudon* v. *Ryder.*[1]

If benefits are to be considered in the present case, on her own evidence the appellant has helped herself to substantial gains by arrogating to herself ownership of the land, paying no rent whatever and renting out the squatter house at $80 a month for almost 20 years.

In the circumstances of the case, we cannot see that the law or equity can help her.

The appeal is dismissed with costs. Deposit to the respondent owner to account of costs.

Appeal dismissed.

Solicitors: *Shook Lin & Bok; K.C. Chai & Co.*